IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1128

PHILIP PLATZ, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY MEMORANDUM FOR PETITIONER

I.

The first ground for granting certiorari stated in the Petition (Pet.) is that the Court of Appeals affirmed the conspiracy conviction on the theory that petitioner had been charged with a general conspiracy to obtain information from one Weiner, an SEC employee, although the case was not stated or submitted to the jury on this basis. The government's sole response is that the Petition misreads the opinion below. The government declares that the Court of Appeals

gave the other dealings between petitioner and Weiner only evidentiary effect.' (Gov't Mem. p. 3). The debate need not be extended, for the government's reading is refuted by the Court of Appeals' own words:

> "We see no error in the judge's having allowed the jury to find that Miss Parkhurst's assignation with Weiner in February 1936 was an overt act in pursuance of the general conspiracy charged in the indictment even though it antedated Weiner's first knowledge of the Georgia Pacific investigation. Past favors can constitute consideration for action as much as the promise of future ones." Pet. 5a n. 2.

II.

With regard to the second question presented, the meaning of "willfully" in the "Penalties" section of the Securities Act, the government is unable "to perceive any significant difference between the standard suggested by petitioner and that adopted by the court of appeals." (Gov't Mem., p. 4). We submit that the significance of the difference is established by the very case cited in the Petition, *Screws* v. *United States*, 325 U.S. 91. The prevailing opinion of Mr. Justice Douglas[2] carefully distinguished between two tests for a culpable state of mind: (1) a realization

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[1] Of course, it was proper for the District Court to admit evidence of other dealings as tending to show that there was an agreement between Weiner and petitioner relating to Georgia Pacific, as to which he was charged. That this is not the point which the Court of Appeals made is shown by both its language, quoted herein, and its silence regarding those other incidents. "Pet. 16a" referred to at Gov't Mem. p. 3, n.1, is the *District Court's* opinion denying a new trial.

[2] This opinion not only controlled the result in *Screws* but was followed in *United States* v. *Guest*, 383 U.S. 745, 753-754.

by the defendant that he is doing a wrongful act (which was the standard adopted by the Court of Appeals here), and (2) the defendant's specific intent to bring about a result which the statute is designed to prevent (which we submit is also the correct test to be applied under the Securities Act.)[3]

This distinction was critical in *Screws*, since there could not have been any doubt that the defendants there knew that beating a prisoner to death is a wrongful act, whereas their purpose to deprive the

[3] "We recently pointed out that 'willful' is a word 'of many meanings, its construction often being influenced by its context.' Spies v. United States, 317 U.S. 492, 497. At times, as the Court held in United States v. Murdock, 290 U.S. 389, 394, the word denotes an act which is intentional rather than accidental. • • • But 'when used in a criminal statute, it generally means an act done with a bad purpose.' United States v. Murdock, 290 U.S. at page 394. • • • In that event something more is required than the doing of the act proscribed by the statute. Cf. United States v. Balint, 258 U.S. 250. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. Spurr v. United States, supra, 174 U.S. at page 734; United States v. Murdock, supra, 290 U.S. at page 395. • • •

"An analysis of the cases in which 'willfully' has been held to connote more than an act which is voluntary or intentional would not prove helpful as each turns on its own peculiar facts. Those cases, however, make clear that if we construe 'willfully' in § 20 as connoting a purpose to deprive a person of a specific constitutional right, we would introduce no innovation. The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning." *Screws* v. *United States*, 325 U.S. at 101.

See generally, Extended Note B, "Willfulness", in I Working Papers of the National Commission on Reform of Federal Criminal Laws, 148-151 (GPO, 1970).

prisoners of a "specific constitutional right" (325 U.S. at 101) was a matter of proof. The distinction is also material in this case. For example, while there was evidence that petitioner had a general wrongful intent in asserting ownership of Georgia Pacific securities, there is no evidence whatsoever that he intended either to have a sale executed on a down-tick (which is what Regulation 10-1(a) (Count 5) expressly forbids), or even that he intended to cause a decline in or otherwise to manipulate the market in that stock (which is the broader evil at which the regulation and the underlying statute are directed).

III.

As a fallback position, the government would avert review of the judgment below by resort to the concurrent sentence doctrine:

> "In any event, petitioner received identical concurrent sentences on all counts with no one offense supplying unique or aggravating circumstances likely in itself to have influenced the length of the sentence (one year on each count with all but three months suspended)." (Gov't Mem., p. 4.)[4]

There are three separate reasons why this argument must fail:

1. The mere possibility that this Court would ultimately decide one or the other of the questions presented against petitioner's position is insufficient basis

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[4] The government seems to regard a one-year term of imprisonment "with all but three months suspended" as a minor matter, since it sees fit to mention this point twice in its short memorandum (Gov't Mem., pp. 1, 4). Petitioner, who has no prior criminal record, does not view so lightly either the fact of his conviction, the sentence, or the potential collateral consequences discussed in the text.

for denying review if both questions are independently worthy of this Court's consideration.

2. Petitioner, an attorney, faces disciplinary proceedings if his conviction becomes final. Reversal on one or more counts would almost certainly mitigate the collateral consequences of the conviction. Thus the concurrent sentence doctrine is inapplicable under the holding of *Benton* v. *Maryland*, 395 U.S. 784, 790, as the Courts of Appeals have recognized. See *United States* v. *Spears* (U.S. App. D.C. # 23,043 Feb. 16, 1971), slip op. p. 5 and cases cited, id. n. 8.

3. Finally, the government's surmise that no count by itself influenced the length of the sentence is refuted by the record. We have set forth in full, as an Appendix hereto, Judge Weinfeld's remarks in sentencing petitioner (644-646A). The Court explained that "One of the crimes of which the defendant was convicted involved the corruption of a government employee." p. 7a, *infra*. The Securities Act counts were not mentioned. Where the sentencing judge's conscientious explanation reveals that he attached particular importance to a particular count, review on that count would not be foreclosed by the concurrent sentence doctrine—even if the government ultimately prevails in its view that the burden of proof as to need for review should be on the appealing defendant. See *Benton* v. *Maryland*, 395 U.S. 784, 791-792.[5]

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[5] The government's apparent assumption that this Court has already so decided (Gov't Mem., pp. 4-5) is unfounded. But since the government's assertion may influence the lower courts, and in light of the doubts regarding the present state of the concurrent sentence doctrine which the Court of Appeals candidly expressed (Pet. p. 8a), the possibility that the result on the merits may implicate the concurrent sentence doctrine counsels in favor of, rather than against, the grant of certiorari.

Here it is clear that the conspiracy count was the dominant factor in the sentence imposed. Unless the government's effort to recast the Court of Appeals' opinion succeeds, see pp. 1-2, *supra*, the Court's affirmance on that count was clear constitutional error. Thus, even if the issue of statutory interpretation raised with respect to the Securities Act counts (which the government does not deny inheres in every prosecution under this and related statutes) is deemed unworthy of review, summary reversal on the conspiracy count would be appropriate. See Pet., pp. 11-13.

Respectfully submitted,

JUDAH BEST
Dickstein, Shapiro & Galligan
1819 H Street, N. W.
Washington, D. C. 20006
Attorney for Petitioner

GEORGE KAUFMANN
1819 H Street, N. W.
Washington, D. C. 20006
Of Counsel

APPENDIX

Excerpt From Transcript of Sentencing Hearing

THE COURT: One should not think it necessary to state so basic a fact but sometimes it does appear necessary to remind others that the Government, and in this instance the public, the citizens, are entitled to the honest services of its employees.

One of the crimes of which this defendant was convicted involved the corruption of a Government employee. The defendant and a co-conspirator and perhaps others cheated the Government of its right to have the honest services of the SEC employees in connection with the particular transaction in question and that may have extended to other transactions as well. The public is entitled to have confidence that all Government employees live up to a proper code of integrity in the discharge of their duties.

This defendant, by training, should have known of the importance of the integrity of governmental services. Yet, as far as this Court is concerned or can ascertain at this point, there is no indication that the defendant has any understanding of the seriousness of the offense. I am making that statement most advisedly. I have gone over as much information as was available and it seems to me that there is no attitude of contrition or understanding of the nature of the offense. On the contrary, the impression that one gathers is that this is a sort of a white collar crime which doesn't carry with it any moral degradation of any kind.

It is true as counsel for the defendant suggested, that in the light of his professional standing and, in some measure, the defendant has wrought his own punishment. Again, I think this isn't the sole answer to the problem of sentencing. There is the interest of the community to be considered.

I have not been unaware, Mr. Todel, of all the factors to which you referred with reference to the defendant's

desire to achieve a certain status in the community. However, it does seem to me this should be on the basis of merit and not on the basis of the means which were used by this defendant.

Under all the circumstances the Court is satisfied that the interest of justice and the best interest of the public, as well as the defendant, will be served by the imposition of a jail sentence under the provisions of Section 3651 of Title 18.

The Court imposes a sentence of one year with a provision that the defendant be confined to a jail-type institution for treatment for a period not to exceed three months and the execution of the remainder of the sentence is suspended and the defendant is placed on probation for a period of one year.